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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

09 CR 0722 (MGC)

5 STEPHEN WALSH,

6 Defendant.  
7 -----x

8  
9 New York, N.Y.  
February 5, 2014  
10 11:25 a.m.

11 Before:

12 HON. MIRIAM GOLDMAN CEDARBAUM,

13 District Judge

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the  
Southern District of New York

17 JOHN J. O'DONNELL

Assistant United States Attorney

18 SHER TREMONTE

19 Attorneys for Defendant

20 MICHAEL TREMONTE

21 ALSO PRESENT:

22 MICHAEL BRACONI - FBI SPECIAL AGENT  
23  
24  
25

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1 (Case called)

2 MR. O'DONNELL: John O'Donnell, for the government.  
3 With me is F.B.I. special Michael Braconi.

4 MR. TREMONTE: Michael Tremonte, for Mr. Walsh.

5 THE COURT: This case has limped along for a long  
6 time. First, I would like to be clear on what's the best  
7 estimate of the length of the trial.

8 MR. O'DONNELL: For the government, two to three  
9 weeks.

10 THE COURT: There is a big difference between two and  
11 three weeks.

12 MR. O'DONNELL: Probably closer to two, but I don't  
13 want to underestimate and guess wrong. I'm being conservative.

14 THE COURT: Who wants it for July?

15 MR. O'DONNELL: I would like it sooner. Defense wants  
16 July.

17 THE COURT: That's what the speedy trial statute would  
18 like also.

19 What is it that you would like at the moment?

20 MR. TREMONTE: Your Honor, as of quite recently we now  
21 have all the discovery in the case.

22 THE COURT: Good.

23 MR. TREMONTE: When it became clear, I believe, in  
24 July that we would not be receiving the materials from Mr.  
25 Flesner, the government, Mr. O'Donnell agreed to reproduce the

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1 discovery.

2 THE COURT: I read about that, yes.

3 MR. TREMONTE: We received, as I detailed in the  
4 letter, productions on a very regular basis from the  
5 government. I believe there were between 8 and 12 separate  
6 productions between July and that ended in November.

7 Just to be clear, the productions were almost all in  
8 digital form, although in different digital forms. Sometimes  
9 it would be a box of 50 CDs. Sometimes it would be two or  
10 three or four DVDs, which contained a great deal more  
11 information. Sometimes it would be on digital drives; hard  
12 drives, they come in these small boxes.

13 THE COURT: In any event you got a lot of material.

14 MR. O'DONNELL: Yes.

15 MR. TREMONTE: And then we began the process in  
16 November working with Smart Data, an outside vendor, because  
17 the Kroell firm wouldn't allow us to move forward with them.  
18 We contracted with a new vendor. I would say as of mid  
19 December we have had the ability to begin reviewing that  
20 discovery.

21 THE COURT: Have you not done it?

22 MR. TREMONTE: We have done some of that, your Honor.  
23 We had a trial, as I detailed in the letter in December,  
24 December going into early January. We are very hard at work,  
25 as we have been since we were engaged in this case. First, we

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1 were hard at work trying to get the discovery. Then we've been  
2 hard at work processing it.

3 THE COURT: You have a transcript of the hearing, the  
4 Monsanto hearing, which really reflects a large piece of the  
5 trial.

6 MR. TREMONTE: It does, your Honor, although, it  
7 doesn't give really any information in terms of what's most  
8 important to us, which is material we need to review to find  
9 impeachment material.

10 THE COURT: You can't expect the government to help  
11 you impeach their witnesses.

12 MR. TREMONTE: Exactly right, your Honor. That's why  
13 we feel it's extremely important for us to have adequate time  
14 to actually unearth the materials from this big chunk of data  
15 that we need.

16 THE COURT: You think this data is going to give you  
17 impeachment material?

18 MR. TREMONTE: We do, your Honor. I think for good  
19 reason. For example, our client, during almost the entire  
20 relevant period, was in a completely separate office. The two  
21 main cooperating witnesses who were in a different location had  
22 a separate set of e-mail communications, a separate set of  
23 documents that they kept. There is a great deal of evidence  
24 that we can only obtain from files that were in their exclusive  
25 possession, then the government's possession, which we have

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1 just recently received. We do believe that we will find ample  
2 impeachment material in those e-mail communications and  
3 documents, which we haven't seen before.

4 THE COURT: But you now have them. You have had them  
5 for a while.

6 MR. TREMONTE: We have had access to them for a few  
7 weeks at most. Most of that time we have been on trial.

8 THE COURT: But you undertook to represent this client  
9 in this case knowing whatever your other professional  
10 obligations were. That's not really a reason to postpone this  
11 trial.

12 MR. TREMONTE: Your Honor, we were put in something of  
13 a difficult spot because when we were asked about the  
14 scheduling of the other trials that we have, for example, in  
15 April, one in front of Judge Forrest and the other in front of  
16 Judge Crotty, we had to answer honestly that we did not know  
17 when this would go forward. Those were put down for April.  
18 That's now just two months away. We have two very substantial  
19 federal trials in April, and we would absolutely have  
20 rescheduled those, or adjourned them, or at least sought to if  
21 we had a better sense of when this would go forward. I  
22 apologize.

23 THE COURT: This is the clear this is the oldest of  
24 the three.

25 MR. TREMONTE: Yes, although we couldn't treat it that

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1 was because, in the first place from our perspective, we only  
2 had access to the relevant discovery as of mid-to-late December  
3 of last year. We had these other trials that got scheduled.

4 THE COURT: We have to look forward.

5 When are those trials going to be held?

6 MR. TREMONTE: They both begin on April 7. One is  
7 anticipated to be two to three weeks. I believe the other is  
8 approximately the same.

9 THE COURT: My experience is two to three week trials  
10 never take three weeks.

11 MR. TREMONTE: I hope that's right. They will be done  
12 by the end of April, your Honor.

13 THE COURT: Right.

14 MR. TREMONTE: That's why we requested that we have  
15 time after that that's adequate for us to complete our review  
16 of the discovery, prepare our witnesses and move forward.

17 THE COURT: How many lawyers do you have in your firm?

18 MR. TREMONTE: We are five full-time lawyers.

19 THE COURT: You certainly are not going to be need  
20 five full-time lawyers working on those two cases.

21 MR. TREMONTE: I wish we had more, your Honor.

22 THE COURT: We all wish we had more of everything.

23 MR. TREMONTE: Thankfully we have been fortunate, we  
24 do have other cases in addition to those trials. We are really  
25 firing on all cylinders around the clock to keep our docket

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1 going.

2 THE COURT: It's very rare in my experience that all  
3 cases scheduled for trial, in fact, go to trial.

4 MR. TREMONTE: These two, we are contrary confident  
5 that they will. They have been adjourned before. Judge  
6 Forrest and Judge Crotty have both made very clear that they  
7 will not permit another adjournment.

8 THE COURT: You are asking for essentially for three  
9 full months of trial preparation time after those cases are  
10 finished? That's a very luxurious schedule for a trial lawyer.

11 MR. TREMONTE: Actually, two, your Honor. We  
12 anticipate we would be done by the end of April. That would  
13 take us into May. Then we wanted to have June and July to  
14 prepare. I don't think in the typical case we would ask for  
15 that kind of time, but it's really hard to overemphasize just  
16 how voluminous the materials here are. We feel like we have  
17 made a good start, but we do want to responsibly review them  
18 and make sure that we have done everything that we can within  
19 reason to be prepared. We do think that will take about a  
20 month. Then we would need a month beyond that to prepare our  
21 witnesses, our jury addresses or motions.

22 THE COURT: You haven't prepared any witnesses up to  
23 now? That seems hardly likely.

24 MR. TREMONTE: We really have been doing our best,  
25 your Honor.

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1           THE COURT: I'm not criticizing your preparatory  
2 efforts. It's very rare to have, as you have in this case, a  
3 trial rehearsal. That is a rehearsal of the entire charge  
4 against your client set out in print.

5           MR. TREMONTE: Mr. O'Donnell has said this on a number  
6 of occasions before.

7           THE COURT: It's not from him that I'm basing that.  
8 I'm basing that on what I heard myself in the courtroom.

9           MR. TREMONTE: I understand, your Honor. I think it's  
10 fair to point out, as the Court well knows, the standard in the  
11 Monsanto is hearing is quite a bit lower than it would be at  
12 trial. I don't think the government put forward even the bulk  
13 of the evidence that they would present. In particular, they  
14 did not put on their main witnesses. As I understand this  
15 case, the evidence that purportedly, allegedly links my client  
16 to the alleged wrongdoing is really all going to come out of  
17 the mouth of these witnesses. They did not testify.

18          THE COURT: Most of what was testified to at the  
19 trial, at the preliminary trial that I heard, was out of the  
20 mouth of the principal witness against your client.

21          MR. O'DONNELL: The other thing I would add is the  
22 defense has now all the 3500 material for those witnesses who  
23 was produced in advance of the Monsanto hearing and was given  
24 to new counsel shortly after they appeared.

25          THE COURT: You have a rare amount of other kinds of



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1 important discovery.

2 MR. TREMONTE: I think that's right, your Honor. But  
3 equally rare is the volume of the discovery, besides the 3500  
4 and the very important task -- critical from our perspective --  
5 of unearthing impeachment material is unusually difficult in  
6 this case and unusually time consuming. I never had a case,  
7 working on either side of the business, that had this volume of  
8 documents that needed to be reviewed to adequately prepare for  
9 trial. I have never seen anything like that.

10 THE COURT: At some point you decided to accept  
11 representation in a case in which whether you were going to be  
12 paid remained to be seen; isn't that true?

13 MR. TREMONTE: That is correct.

14 THE COURT: You must have looked at something before  
15 you made that decision.

16 MR. TREMONTE: We did, your Honor. We are not  
17 complaining at all about the risk that we undertook. In fact,  
18 we are prepared to do as we would do whether we get paid or  
19 not, everything that we are charged with doing to ensure that  
20 our client has the best defense. My point is in this case,  
21 given the volume, that's an awful lot of work to do in a span  
22 of four weeks.

23 THE COURT: That may be, but also the time problems  
24 were also quite foreseeable. In any event, if I set this trial  
25 for sometime in July, can we finish it?

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1 MR. O'DONNELL: Yes. We prefer it to be much sooner.

2 THE COURT: I understand.

3 MR. O'DONNELL: One thing I would point out, counsel  
4 has certainly been extremely diligent since they appeared. We  
5 don't have any quarrel with them. Most of the material was  
6 produced years ago.

7 THE COURT: Long before, I agree.

8 MR. O'DONNELL: To predecessor counsel. We are really  
9 prejudiced by the length of time it's taken to get the case to  
10 a trial posture.

11 THE COURT: Whether you are prejudiced, I'm not sure.  
12 Delay is always prejudicial.

13 MR. O'DONNELL: The witnesses have been hanging around  
14 for a long time.

15 THE COURT: One can never be sure what's going to  
16 happen. I don't see much point in haggling over the space of  
17 one month, for example. I could put it for June instead of  
18 July. I take it you are not really quarreling with them going  
19 forward with their cases in April.

20 MR. O'DONNELL: We were hoping for a trial date in  
21 March.

22 THE COURT: I was hoping for even earlier.

23 MR. O'DONNELL: We were hoping for earlier, too. My  
24 mandate is to get the earliest possible trial date I could get.

25 THE COURT: Of course. That is my purpose, to get the

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1 earliest fair trial date.

2 MR. TREMONTE: Your Honor, if I may, I very much  
3 appreciate Mr. O'Donnell saying that we have been diligent.  
4 I'm glad he appreciates that.

5 We have never asked for a delay. We tried everything  
6 that we could possibly think of to compel predecessor counsel  
7 to give us anything. They refused even to turn over the case  
8 file. I agree they had the benefit of this discovery years  
9 ago, but we couldn't even get summaries. I personally think  
10 that's shameful, but it did happen.

11 In terms of prejudice, we really would like to have  
12 the time. We think it's fair. We think it's appropriate. We  
13 have never asked for a delay.

14 THE COURT: I'm going to schedule trial for July 8,  
15 which is a Tuesday at 9:30 in the morning. Normally trial will  
16 start at 10:00 in the morning, but the first day we start at  
17 9:30 to resolve any outstanding housekeeping issues.

18 I hope it will take two rather than three weeks,  
19 because I have been out a lot recently, I have an awful lot to  
20 accomplish between now and then.

21 I will expect proposed charges by May 28. I use the  
22 struck panel method of jury selection, which means if juror  
23 number one is challenged, juror number two becomes juror number  
24 one and so on. I will question the whole panel, and then I  
25 will take objections in the robing room. I should add that the

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1 Supreme Court has long ago held that if both sides challenge  
2 the same juror, because objections are simultaneous, which is a  
3 practice I follow, that both sides have gotten their objection  
4 to the juror, their challenge. No one has been deprived of  
5 anything because you each got what you wanted. That's what  
6 lawyers don't like about simultaneous challenges. But it's  
7 actually an artificial notion that you're not getting what you  
8 want. You do.

9 How are we going to resolve any other problems  
10 foreseen between now and then?

11 MR. O'DONNELL: I don't know if the defense  
12 anticipates any motions. I expect there will probably be some  
13 evidentiary applications that will present to Court in advance  
14 of trial, that the Court can rule upon.

15 THE COURT: What kind of evidentiary applications?

16 MR. O'DONNELL: Motions in limine or highlighting  
17 evidentiary issues that may arise during the trial. Our plan  
18 would be if there are any such things, we would know the Court  
19 in advance of the trial.

20 THE COURT: Of course you want to do that, but when it  
21 comes to relevance, for example, I have to hear the evidence in  
22 order to rule sensibly. Not everything is a proper subject of  
23 in limine motions before a trial.

24 MR. O'DONNELL: Correct.

25 THE COURT: I'm sure all of you are good enough

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1 lawyers to make applications you think you should do before  
2 trial, before trial.

3 MR. O'DONNELL: Yes.

4 MR. TREMONTE: Yes, we will do that.

5 THE COURT: We can presumably have a final pretrial  
6 conference of some sort before actually going to trial.

7 MR. O'DONNELL: That's a good idea.

8 THE COURT: That we will do the week before. June 26  
9 at 10:00 a.m.

10 MR. O'DONNELL: June 26 or 27, your Honor?

11 THE COURT: June 26 at 10:00 in the morning, we will  
12 have a final pretrial conference. It will really will not be  
13 final, because we will have a conference on proposed charges at  
14 the end of the trial, but we will call it a final pretrial  
15 conference at 10 o'clock on the 26th of June.

16 Is there anything further?

17 MR. O'DONNELL: Just to exclude time under the Speedy  
18 Trial Act. We are very concerned about the number of days that  
19 have already been lost on the clock.

20 THE COURT: Very well. I take it, Mr. Walsh, that you  
21 agree that the time required for proper preparation of your  
22 defense outweighs in the interest of justice between now and  
23 June 26 for trial preparation?

24 THE DEFENDANT: Yes, I do, your Honor.

25 THE COURT: Very well, I will adopt that finding. On

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1 that basis I will exclude the time between now and July 8.

2 MR. O'DONNELL: Just so the record is clear, the time  
3 will be excluded through July 8.

4 THE COURT: Through the opening of the trial.

5 MR. O'DONNELL: Thank you, your Honor.

6 MR. TREMONTE: Thank you, your Honor.

7 THE COURT: The time between now and July 8 will be  
8 excluded based on the defendant's agreement that that time is  
9 required for proper preparation of his defense.

10 Are there any motions contemplated before trial?

11 MR. O'DONNELL: Not from the government, your Honor.

12 MR. TREMONTE: Not from the defense, your Honor.

13 THE COURT: Is there anything further?

14 MR. O'DONNELL: Not from the government, your Honor.

15 MR. TREMONTE: Not from the defense, your Honor.

16 THE COURT: Very well. You are all excused.

17 (Adjourned)